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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 162

HAROLD SHRIER, INDIVIDUALLY AND DOING BUSINESS UNDER THE NAME AND STYLE OF A. SHRIER & SONS COMPANY, A REGISTERED MICHIGAN COPARTNERSHIP, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 30–34) is not yet reported. The memorandum opinion and order of the district court, overruling petitioner's demurrer to the information (R.13–18), are not reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 4, 1945 (R. 30). The peti-

tion for a writ of certiorari was filed on June 25, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court, May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution for violation of a maximum price regulation, the defendant is entitled to defend on the ground that the regulation is void and unenforceable because it was issued without the prior approval of the Secretary of Agriculture.

2. If so, whether Revised Maximum Price Regulation 271, as amended, required the prior approval of the Secretary of Agriculture.

STATUTORY AND OTHER PROVISIONS INVOLVED

The pertinent statutory and other provisions involved are set forth in the Appendix, *infra*, pp. 11–16.

STATEMENT

An information in eight counts was filed against petitioner and Caroline Cohen in the United States District Court for the Eastern District of Michigan, charging them with wilfully making wholesale sales of dry onions in July 1943, and potatoes in May 1943, at prices in excess of those permitted by Revised Maximum Price Regulation 271, as amended, issued by the Price Administra-

tor of the Office of Price Administration pursuant to the Emergency Price Control Act of 1942, as amended, and Executive Orders 9250 and 9328 (R. 1–8; see Appendix, *infra*, p. 16.)[1] The defendants filed a demurrer to the information, in which it was contended, *inter alia*, that the regulation was invalid in that it was issued by the Price Administrator without the prior approval of the Secretary of Agriculture as required by Section 3 (e) of the Act (R. 9–13; see Appendix, *infra*, p. 11). On January 13, 1944, the district court overruled the demurrer (R. 13–18). Thereafter, on motion of the Government, the information was dismissed as to Caroline Cohen, and counts 6–8 were dismissed as to petitioner (R. 23.) Petitioner pleaded guilty to the remaining counts on June 1, 1944, and simultaneously filed a motion in arrest of judgment raising the same contention presented in the demurrer as to the validity of the regulation (R. 18, 19–22). It was stipulated that, if the motion was denied and judgment of conviction entered, petitioner was to have the right to appeal therefrom (R. 18–19). On September 6, 1944, judgment of conviction was entered, and petitioner was sentenced to imprisonment for four months and to pay a fine of $1,000 (R. 23). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment of

[1] The first seven counts related to sales of onions, and the eighth count to the sale of potatoes.

conviction was affirmed. The court held that petitioner's claim that the regulation was unenforceable for lack of prior approval by the Secretary of Agriculture constituted an attack on the validity of the regulation, and, consequently, that under the authority of *Yakus* v. *United States,* 321 U. S. 414, there was no jurisdiction in the district court to determine that question. (R. 30–34.)

ARGUMENT

1. Petitioner contends (Pet. 3–6, 10–18, 18–32) that, since the regulation was issued by the Price Administrator without the prior approval of the Secretary of Agriculture,[2] it was not validly promulgated and was void on its face, so that the case presents the question reserved in *Yakus* v. *United States,* 321 U. S. 414, 446–447, whether "one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face." Petitioner further contends that the lack of the Secretary of Agriculture's approval goes to the existence of the regulation and not merely to its validity (Pet. 31–32). We submit that the circuit court of appeals was clearly correct in holding that the district court had no jurisdiction to determine the validity of the regulation, and that petitioner's claim "amounts to

[2] The regulation shows that it was approved by the Acting War Food Administrator (see Appendix, *infra,* p. 16).

no more than that the regulation is invalid" (R. 33–34.)

The contention advanced by petitioner was rejected by the Circuit Court of Appeals for the Ninth Circuit in *Rosensweig* v. *United States,* 144 F. 2d 30, 33, in which this Court denied certiorari, 323 U. S. 764.[3] As we pointed out in our brief in opposition in that case (No. 442, October Term 1944, pp. 6–7), an attack of this nature is not pitched upon any constitutional ground, but upon the ground that the regulation fails to comply with a statutory condition imposed upon the Price Administrator's authority to establish maximum prices. Moreover, even if the regulation is invalid because of a failure of prior approval by the Secretary of Agriculture, such invalidity does not, as asserted by petitioner, appear on its face, and there is no requirement, as pointed out by the court below, "that it appear on the face of the regulation that such approval has been had" (R. 34). See also *Sherman* v. *United States,* 36 A. 2d 556, 561 (Mun. Ct. App., D. C.). It is clear that the question presented by petitioner is precisely the sort of question committed to the exclusive jurisdiction of the Emergency Court of Appeals. Whether the attack on the regulation is put in terms of its validity or existence, it would be no less confusing here than it was in *Yakus* v.

[3] The contention was also rejected in *United States* v. *Renken,* 55 F. Supp. 1 (W. D. S. C.).

United States, 321 U. S. 414, 433, to permit judicial review of the regulation to be had in any federal or state court.

Finally, by the amendment of June 30, 1944, to the Emergency Price Control Act (Section 204 (e), Appendix, *infra,* pp. 12–13), Congress made it plain that in criminal prosecutions for violation of a regulation issued under the Act, a challenge to the validity of a regulation could not be determined in a criminal prosecution, but was to be disposed of exclusively by the Emergency Court of Appeals. That amendment provides, *inter alia,* that, upon application by the defendant in a criminal prosecution within five days after judgment of conviction, the criminal court shall grant leave to the defendant to object to the validity of the regulation in the Emergency Court of Appeals, if it finds that the objection is made in good faith and there is a reasonable excuse for the defendant's failure to have objected to the regulation before the Price Administrator; and that, if the Emergency Court of Appeals thereafter sustains the defendant's objection, the criminal proceeding shall be dismissed.[4] Since the judgment convicting petitioner was not

[4] In discussing the amendment on the floor of the Senate, Senator Danaher, after directing the attention of the Senate to the reservations in the *Yakus* case as to an attack on the validity of a regulation in a criminal prosecution, said: "But in what we have done we have perfected the two points as to which the Supreme Court had entered no decision, to the end that there can be no question of the denial of or the existence of due process" (90 Cong. Rec. 5305).

entered until September 6, 1944 (R. 23), which was subsequent to the effective date of the amendment, the procedure provided by the amendment was available to petitioner. Having failed to resort to it, he did not have any standing thereafter, in the criminal case, to assail the validity of the regulation.

2. But even if petitioner were free, in the criminal proceeding, to challenge the validity of the regulation for want of approval by the Secretary of Agriculture, he would gain nothing, because the regulation was valid.[5] Cf. *Brooks* v. *Dewar*, 313 U. S. 354. Revised Maximum Price Regulation 271 was issued by the Price Administrator on May 25, 1943, with the approval of the War Food Administrator (Appendix, *infra*, p. 16). On April 8, 1943, the President had issued Executive Order 9328, which transferred the powers, functions, and duties conferred on the Secretary of Agriculture, under Section 3 of the Emergency Price Control Act, to the Food Administrator; and on April 19, 1943, by Executive Order 9334, the official title of the Food Administrator was changed to War Food Administrator (Appendix, *infra*, pp. 15–16).

Executive Order 9328, which transferred the functions of the Secretary of Agriculture to the

[5] The circuit court of appeals stated that it was unnecessary to pass upon this feature of the case in view of its holding that the criminal court was without jurisdiction to determine the validity of the regulation (R. 33–34).

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War Food Administrator, was authorized by the First War Powers Act, Section 1 of which expressly authorized the President "to make such redistributions of functions among executive agencies as he may deem necessary * * * and to this end * * * to make such regulations and to issue such orders as he may deem necessary." (Appendix, infra, p. 14). The functions which the President was thus authorized to redistribute included not only the functions which were provided for in existing statutes, but also those provided for by laws subsequently enacted. This is evident from the provisions of Section 5 of the Act, to the effect that upon the termination of the Act, "all executive or administrative agencies * * * shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided". (Appendix, *infra,* p. 14). Moreover, Congress ratified the transfer of the functions of the Secretary of Agriculture to the War Food Administrator when it appropriated $25,000,000 "for expenses necessary to enable the War Food Administration to perform its functions, including those prescribed by Executive Orders 9280, 9322, 9328, and 9334." Department of Agriculture Appropriation Act, 1944, approved July 12, 1943, 57 Stat. 392, 415 (Appendix, *infra,* p. 15).[6] The situation here

[6] The violations for which petitioner was convicted occurred on July 14, 15, 16, and 19, 1943 (see R. 1–6).

presented is thus not unlike that involved in *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, where this Court upheld the validity of an executive order transferring the functions of the Shipping Board to the Department of Commerce, and referred to the fact that Congress appeared to have recognized the validity of the transfer and ratified the action by appropriating to the Department of Commerce funds to carry out the Shipping Act and referring to the executive order in the appropriation act. 300 U. S. at 147.

The Emergency Price Control Act, contrary on petitioner's contention (Pet. 18–26), did not revoke the powers conferred upon the President by the First War Powers Act to redistribute the functions of executive and administrative officers and agencies. It is true that Section 201 (b) of the Price Control Act provides that "notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator" (Appendix, *infra,* p. 11). This placed a limitation on the powers conferred upon the President, by the First War Powers Act, to redistribute functions among the various executive agencies, but it did not terminate them. The President could not validly transfer the functions of the Secretary of Agriculture to the Price Administrator; but there is neither an express nor

an implied prohibition against a transfer of those functions to some other officer or agency, such as the War Food Administrator. Indeed, the very prohibition against transfer of the functions to the Price Administrator would seem to imply clearly that transfer to another officer or agency was permissible. The transfer having been lawfully effected, and the regulation having been approved by the War Food Administrator, the contention that the regulation was invalid for want of approval by the Secretary of Agriculture is plainly without substance.

CONCLUSION

The decision below is correct, there is no conflict, and no question is presented meriting review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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